Date: August 29, 1997

Case No.: 94-INA-637

In the Matter of:

ALBERTO'S MEXICAN RESTAURANT,
Employer

On Behalf Of:

MISAEL OCHOA-ALVARADO,
Alien

Appearance: Susan M. Jeannette, Immigration Processor
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On July 19, 1993, Alberto's Mexican Restaurant ("Employer") filed an application for labor certification to enable Misael Ochoa-Alvarado ("Alien") to fill the position of Assistant Cook (AF 71-72). The job duties for the position are:

> Assistant cook with the responsiblities [sic] and duties of assisting and/or taking over when the cook is unavailable. Prepare a full range of Mexican specialty items in the authentic Mexican way. Must be able to prepare enchiladas, burritos, tacos, tostados, chile releno, machacha, beans, rice, salsa, guacamole, etc. Must be able to operate all standard restaurant equipment and utensils. Able to control inventory and schedule staff in the absence of the head cook. Step in and take charge in the absence of the cook.

The requirements for the position are six years of grade school and two years of experience in the job offered or in a related occupation (restaurant). Other Special Requirements are:

> Must speak Spanish, as the staff is Hispanic. Must pass drug testing if hired. Must have Foodhandler's card.

The CO remanded the case to the State Office on March 21, 1994, pending an investigation report from a site visit (AF 94).

The CO issued a Notice of Findings on May 11, 1994 (AF 62-69), proposing to deny certification on the grounds that:

> . . . the employer, Alberto's Mexican Restaurant, has failed to document that the job is *bona fide* as described, that it is truly open, and that a U.S. worker who applied was recruited in good faith and rejected for a job-related reason, and that there are no unduly restrictive requirements. Also the employer has submitted an incomplete application which must be completed.

Specifically, the CO noted that the Employer has reported a payroll showing that there are several employees, all of whom are either part time or are making less than $4.00 per hour, which is below the offered salary of $7.00 per hour. The CO questioned how the Employer can pay an Assistant Cook the prevailing wage where the other employees do not earn as much, and also whether the offered position is truly for an assistant to the head cook. Additionally, the Employer

[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

has stated that about 20 employees are needed; however, there is no evidence that the income of the business supports such an expansion or that the prevailing wage can be offered to new workers where the existing employees are earning less. The CO also questioned that Employer has reported "about" three employees, yet the application for labor certification states that the Alien will supervise three employees. Additionally, the CO determined that Employer must provide the Alien's exact relationship (if any) to each owner. 20 C.F.R. §§ 656.3, 656.20(c)(4), 656.20(c)(8). Regarding the incomplete ETA 750B form, the Alien has not listed all employment for the past three years, which may be done by amending the ETA 750B. 20 C.F.R. § 656.22.

The CO next determined that U.S. applicant Dolores Gonzalez is considered to be qualified and that the Employer should have made additional efforts to contact her. 20 C.F.R. § 656.21(b)(6) (now recodified as § 656.21(b)(5)); *Diana Mock*, 88-INA-255 (April 9, 1990). Moreover, the CO found the following job requirements to be unduly restrictive, in violation of § 656.21(b)(2)(i)(A) as they are not normally required for the successful performance of the job in the United States: (1) possession of a Foodhandler's card - a Foodhandler's card can apparently be obtained by an employee when starting the job; (2) Spanish language - the Employer has not documented that the job duties require the assistant cook to speak Spanish with customers fluently; and, (3) must submit to drug testing - there is no evidence that other workers who have been employed have been required to submit to drug testing or that small restaurants in the area normally require drug testing or that there is any documented business necessity. *Information Industries, Inc.* 88-INA-82 (Feb. 9, 1989) (*en banc*).

Accordingly, the Employer was notified that it had until June 15, 1994, to rebut the findings or to cure the defects noted.

In its rebuttal, received May 31, 1994 (AF 27-61), the Employer contended that it is in a position to pay the offered wages for an assistant cook. The Employer further contended that the Alien is not related to the Employer. Employer stated that the Alien is submitting an amendment to the ETA 750B, listing all work since November 1990. Regarding U.S. applicant Gonzalez, the Employer claimed that he did telephone her and she indicated her interest in interviewing for the position, but then did not show up or contact the Employer to reschedule her interview. The Employer stated that if she was qualified for the position, "I would have probably hired her on the spot as I am prepared to fill many positions. I and my family are too tired of working (overtime and double shifts)." Regarding the restrictive requirements, the Employer asserted that anyone applying for this position should have had a Foodhandler's card; the worker must speak Spanish in order to communicate with the other employees, the owner, and the customers; and, it is not possible to take the chance of a drug user working for the Employer. The Employer submitted a statement that he is the co-founder of Alberto's Mexican Restaurants and that over 50 new restaurants have since opened in California, plus additional ones in Arizona and Texas, each of which is independently owned and operated (AF 31). Employer had several attachments to his rebuttal, one of which is a Store Directory, listing the Owner, Location, and Business (AF 35). The Alien's statement is also attached to the rebuttal (AF 48), stating that he has worked at a McDonald's restaurant since November 1991 when he "entered the United States," he has no financial interests in the Employer's business, and he will have no authority to hire and fire employees if he is hired.

The CO issued the Final Determination on July 21, 1994 (AF 21-26), denying certification because: (1) the job is not truly open to U.S. workers, in violation of § 656.20(c)(8); (2) the ETA 750B form has not been completed, in violation of § 656.22 and § 656.21(a)(1); (3) the Employer has failed to document that its rejection of a U.S. worker was for job-related reasons, in violation of § 656.21(b)(6) (now recodified as § 656.21(b)(5)); (4) there are restrictive requirements, in violation of § 656.21(b)(2); and, (5) the Employer has not shown the ability to place the Alien on the payroll as required by § 656.20(c)(4).

On August 15, 1994, the Employer requested reconsideration of the Denial of Labor Certification (AF 2-20). The CO denied reconsideration on August 26, 1994 (AF 1). On September 6, 1994, the Employer requested review of the Denial of Labor Certification (AF A-H). In September 1994, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

Section 656.20(c)(8) provides that the job opportunity must have been open to any qualified U.S. worker. As such, employers are required to make a good-faith effort to recruit qualified U.S. workers for the job opportunity. *H.C. LaMarche Ent., Inc.*, 87-INA-607 (Oct. 27, 1988). Further, § 656.21(b)(6) provides that an employer must show that U.S. applicants were rejected solely for lawful, job-related reasons. Therefore, actions by the employer which indicate a lack of good-faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient U.S. workers who are "able, willing, qualified and available" to perform the work as required by § 656.1.

In this case, the Employer's recruitment report indicates that there was one U.S. applicant, Delores Gonzales (AF 74). The Employer stated that he sent her a letter inviting her to interview; however, she did not show up or call to reschedule. The Employer stated that a copy of the letter sent to the applicant was attached. In the NOF, the CO noted that the letter inviting the applicant to interview was not attached to the Employer's recruitment report (AF 65). Accordingly, the CO instructed the Employer to document that Ms. Gonzales was recruited in good faith and rejected for job-related reasons (AF 65).

In response, the Employer stated that he telephoned Ms. Gonzalez for an interview and she indicated that she would be interested in interviewing (AF 29). The Employer further stated that he tried to telephone her again, but her number has changed. In addition, the Employer stated that:

> I certainly shouldn't be required to interview someone that did not have the courtesy to call and cancel or reschedule. . .. I surely do not have to chase someone for an open position that does not have the courtesy to report that she will not be attending a scheduled interview. She was not rejected for a job-related reason, she rejected herself. Because if she was qualified, I would have probably hired her on the spot as I am prepared to fill many positions. . .. (AF 29).

In the Final Determination, the CO found that the Employer failed to document that it rejected Ms. Gonzales for job-related reasons (AF 4). We agree with the CO. We emphasize that the burden is on the Employer to establish that he engaged in a good-faith recruitment effort. The Employer in this case has failed to meet his burden for several reasons. First, the Employer has not even established that he contacted the applicant as the alleged letter inviting the applicant for an interview was never submitted. Moreover, the Employer has not supplied any details regarding his recruitment efforts, such as the dates of his alleged contact with the applicant.[2] *Yaron Development Co., Inc.*, 89-INA-178 (Apr. 19, 1991) (*en banc)*, held that a recruitment report must describe the details of the employer's recruitment efforts to be sufficient. See also, *Venk Jewelry*, 89-INA-348 (July 30, 1990) (did not detail dates or times of calls or offers to interview, or who made the calls). Furthermore, mere assertions of recruitment activity are insufficient without supporting documentation. *Paterson Board of Education*, 88-INA-88 (Apr. 21, 1988). Thus, it is impossible to determine whether Ms. Gonzales was contacted in a timely manner, if at all. Labor certification is properly denied where the Employer does not provide copies of the interview letters it allegedly sent or certified mail receipts or documentation that it attempted to contact the applicants by telephone. *M.D.O. Development Corp.*, 92-INA-326 (July 19, 1993). Finally, we note that, if an employer attempts to contact an applicant after the CO alleges that the applicant was not contacted or interviewed, or was rejected, the fact that the employer shows that the applicant is now unavailable does not cure the initial violation. *Bruce A. Fjeld*, 88-INA-333 (May 26, 1989) (*en banc)*; *Suniland Music Shoppes*, 88-INA-93 (Mar. 20, 1989) (*en banc)*. Therefore, the Employer's assertion that the applicant's number has been changed is not relevant to this discussion.

Based on the foregoing, we find that the Employer has failed to establish that there are no U. S. workers who are able, willing, qualified, and available for the position. Accordingly, the CO's denial of labor certification is hereby AFFIRMED.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not

[2] We find it suspect that the Employer did not mention that he also attempted to telephone the applicant for an interview until he submitted his rebuttal (AF 28).

favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.